Office of the Information & Privacy Commissioner for British Columbia

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Order F17-28

MINISTRY OF TRANSPORTATION AND INFRASTRUCTURE

Carol Whittome
Adjudicator

May 10, 2017

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Summary: An applicant requested information about traffic at a redesigned intersection near a Tsawwassen First Nation development. The Ministry provided the responsive records and withheld some information under s. 16(1)(a) (harm to relations between the government and an aboriginal government) and s. 16(1)(b) (reveal information received in confidence from an aboriginal government) of FIPPA. The applicant later stated that the Ministry must disclose the information, as it was "clearly in the public interest" to do so under s. 25. The adjudicator found that the Ministry was not authorized to withhold the information under ss. 16(1)(a) or (b), and that s. 25 did not apply to the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 16(1)(a) and (b) and 25; Schedule 1 definition of "aboriginal government".

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC); Order F16 - 06, 2016 BCIPC 7 (CanLII); Order No. 165-1997, 1997 CanLII 754 (BC IPC); Order F15-64, 2015 BCIPC 70 (CanLII); Investigation Report F16-02, 2016 BCIPC 36; Order 01-13, 2001 CanLII 21567 (BC IPC); Order No. 14-1994, [1994] B.C.I.P.C.D. No. 17; Order No. 331-1999, 1999 CanLII 4253 (BC IPC).

Cases Considered: *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124.

INTRODUCTION

[1] This order arises out of a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Transportation and Infrastructure (Ministry) for records relating to traffic at redesigned intersections near a Tsawwassen First Nation development site. The applicant was specifically

interested in the "timings and any reports, such as the Bunt Report (2012) to Tsawwassen First Nation."

[2] The Ministry provided the responsive records but withheld some of the information under s. 16 of FIPPA. The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision to sever information from the records. The applicant further asserted that the records should be disclosed without delay pursuant to s. 25 of FIPPA, as the records are "clearly in the public interest." Mediation did not resolve the issues and the applicant requested to proceed to a written inquiry.

[3] In their inquiry submissions the parties provided more specificity regarding the sections of FIPPA that are at issue. The Ministry clarified that it was relying on ss. 16(1)(a)(iii) and (b), and the applicant's submissions indicated that he believed s. 25(1)(b) applied.

ISSUES

[4] The issues to be decided in this inquiry are as follows:

1. Whether the Ministry is required to disclose, without delay, the information under section 25(1)(b) of FIPPA because the disclosure is clearly in the public interest;

2. Whether the Ministry is authorized to refuse to disclose the information at issue under s. 16(1)(a) of FIPPA because disclosure could reasonably be expected to harm the conduct of relations between the BC government and an aboriginal government; and

3. Whether the Ministry is authorized to refuse to disclose the information at issue under s. 16(1)(b) of FIPPA because disclosure would reveal information received in confidence from an aboriginal government.

[5] Section 57 of FIPPA sets out the burden of proof in an inquiry. The Ministry has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under s. 16(1)(a)(iii) and (b).

[6] Section 57 of FIPPA is silent on the burden of proof with respect to s. 25(1)(b) of FIPPA. However, I agree with the following statement from previous orders:

> Again, where an applicant argues that s. 25(1) applies, it will be in the applicant's interest, as a practical matter, to provide whatever evidence the applicant can that s. 25(1) applies. While there is no statutory burden

> on the public body to establish that s. 25(1) does not apply, it is obliged to respond to the commissioner's inquiry into the issue, and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.[1]

DISCUSSION

Records

[7] The Ministry disclosed 95 pages of responsive records to the applicant. However, it is withholding small amounts of information from a report prepared by Bunt & Associates and a PowerPoint presentation about the report.[2] I will refer to these two records together as the "Bunt Report" throughout this Order. There is also a draft version of the report. For clarity, only the final version of the Bunt Report is at issue, not the draft version.[3]

[8] The Bunt Report refers to a traffic simulation model that Bunt & Associates developed to understand both existing and future traffic conditions, volume and queuing. I will refer to the withheld information is "statistical information" including, for instance, estimates of trip time and volume for resident and non-resident traffic, graphs and statistics in photo or map format.[4]

[9] There is also some withheld information that the applicant states he is not seeking. Specifically, he says that he does not want what the TFN believes to be "confidential material related to the development of treaty lands" and that he does not want to see information about "how and when they [TFN] may be developing their lands."[5]

[10] I have reviewed the records and can confirm that pages 21, 23, 24, 28, 29 and 31 of the records contain only the type of information the applicant says he does not want. Therefore, I will not consider that information in this Order.[6]

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[1] Order 02-38, 2002 CanLII 42472 (BC IPC), para. 39, more recently cited with approval in Order F16-06, 2016 BCIPC 7 (CanLII), para. 8.

[2] The report is entitled "Traffic Impact Assessment Traffic Simulation Model – Massey Tunnel and Deltaport Way" and the PowerPoint presentation is entitled "Traffic Impact Assessment – Regional Road Network."

[3] The applicant did not request the draft Bunt Report, but I must refer to the draft Bunt Report in my analysis, as the evidence about whether the information was received in confidence is different for the draft Bunt Report and the final Bunt Report.

[4] The withheld information is information that was obtained from applying the traffic simulation model. Not all of the information is strictly statistical in nature – some of it is refers to recommendations that arise from interpreting the traffic simulation data. I refer to all of this withheld information as "statistical information" for ease of reference.

[5] Applicant submissions, para. 17.

[6] While the Ministry may continue to withhold this information since it is no longer in dispute, I make no finding as to whether the Ministry is authorized to withhold this information pursuant to s. 16.

Background

[11] At the time of the request for records, the applicant was a columnist with a local paper. He states that his main question behind the access request was how the highway would "handle the much-increased traffic to and from the malls."[7] The "malls" that he is referring to are the Tsawwassen Mills mall and the Tsawwassen Commons mall (not yet open), both of which are Tsawwassen First Nation (TFN) developments.

[12] The Ministry supervises maintenance of designated "controlled access" highways under the *Transportation Act*. It also approves subdivisions that are adjacent to controlled access highways.[8] The Ministry may request a Traffic Impact Assessment ("TIA") for any request for a permit to build a new development or alter an existing development on a controlled access highway. In this case, the TFN and Ivanhoe Cambridge, the developer working on behalf of the TFN to build the malls, submitted a TIA.[9]

[13] The TFN and Ivanhoe Cambridge hired Bunt & Associates to create the TIA. The TIA was submitted to the Ministry, who eventually approved it. The TIA is the Bunt Report at issue in this inquiry.

Section 25(1)(b) (clearly in the public interest)

[14] Section 25 of FIPPA requires a public body to disclose information in certain circumstances, even if other provisions in FIPPA would otherwise require or authorize it to be withheld. The part of s. 25 that is relevant in this case states:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
> …
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[15] The applicant submits that s. 25 applies in this case because the "operation of the highway affects millions".[10] He does not elaborate further on these submissions.

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[7] Applicant submissions, para. 7.
[8] Regional Director affidavit, para. 10.
[9] Regional Director affidavit, paras. 14 and 15. I note that both parties provided a significant amount of background information in their submissions. While that material has been useful in providing context, it is not relevant to the legal issues before me and so I have not reproduced it in this Order.
[10] Applicant submissions, paras. 18 and 21.

[16] The Ministry submits that s. 25(1)(b) does not apply in this case, as there is no basis to conclude that this case is one of those "serious situations" to which the provision was meant to apply.[11] It submits that s. 25 is not triggered merely because the applicant or others may be interested in the records in dispute, as the "threshold imposed under the section is much higher than that."[12]

[17] Section 25 overrides all of FIPPA's exceptions to disclosure and, thus, there is a high threshold before it applies. Previous orders have explained this concept as follows: "… the duty under section 25 only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but clearly (*i.e.*, unmistakably) in the public interest...."[13]

[18] The "public interest" does not mean information which has merely "piqued the interest" of the public.[14] Therefore, the fact that the public may have a potential interest in what the information reveals about an issue would not meet the threshold for disclosure of that information as being "clearly" in the public interest under s. 25(1)(b).

[19] I have reviewed the disputed information and there is no evidence that the matters addressed in the records approach the level of magnitude or broader public significance that is required under s. 25(1)(b). Therefore, I find that disclosure of the records is not "clearly" in the public interest and s. 25(1)(b) does not apply.

Section 16 – Intergovernmental Relations

[20] Section 16(1) pertains to inter-governmental relations between the BC government and other governments, including aboriginal governments. The relevant parts of s. 16 are as follows:

> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> > (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:
> > …
> >
> > > (iii) an aboriginal government; …

[11] Ministry submissions, para. 59.
[12] Ministry submissions, para. 62.
[13] Order 02-38, 2002 CanLII 42472 (BC IPC), para. 45 citing Order No. 165-1997, 1997 CanLII 754 (BC IPC). Note that there is no longer a need to establish temporal urgency in order for s. 25(1)(b) to apply: Order F15-64, 2015 BCIPC 70 (CanLII), para. 13.
[14] Investigation Report F16-02, 2016 BCIPC 36 (CanLII), pp. 26 and 27.

> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies….

[21] The Ministry is withholding all of the information in dispute under both ss. 16(1)(a) and 16(1)(b). As much of the evidence involves whether the information was received in confidence, I will first address s. 16(1)(b).

Section 16(1)(b) – received in confidence

[22] In order to rely on this provision, the Ministry must establish that it received this information from an aboriginal government and also that it received it in confidence.

[23] Schedule 1 of FIPPA defines "aboriginal government" as meaning "an aboriginal organization exercising governmental functions."

[24] In this case, there is no question that the TFN is an aboriginal government for the purposes of FIPPA. The TFN, the BC government and the federal government negotiated and entered into the Tsawwassen First Nation Final Agreement in 2007, in a process facilitated by the British Columbia Treaty Commission.[15] This Final Agreement required British Columbia to enact legislation to give effect to the Final Agreement; accordingly, the *Tsawwassen First Nation Final Agreement* was enacted.[16] This Final Agreement clearly sets out TFN's right to self-government.[17] Therefore, I am satisfied that the material before me conclusively establishes that the TFN is an aboriginal government.

[25] It is also clear from the evidence before me that the Ministry received the information in dispute directly from the TFN, as opposed to the developer or the engineers.[18] Therefore, the remaining question is whether the Ministry received this information "in confidence".

[26] In Order No. 331-1999, former Commissioner Loukidelis explained the purpose of s. 16(2)(b), as well as the threshold the public body must meet when it is claiming that the information was received in confidence:

> In cases where information is alleged to have been "received in confidence", in my view, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information. For example, it may be that if a public body asks the British Columbia government for information, and says the

[15] Ministry submissions, para. 35.
[16] Ministry submissions, para. 36.
[17] See, for example, *Tsawwassen First Nation Final Agreement,* Chapter 16, "Governance", para. 1. Online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/tfnfa_1100100022707_eng.pdf>.
[18] Regional Director affidavit, paras. 29 – 30, Exhibits "D" and "E" (*in camera)*; Chief Administrative Officer affidavit, paras. 6 and 7, Exhibits "A" and "B" (*in camera*).

> request is made in confidence, the information will have been received in confidence. But if the government declines at the outset to treat the supply as being confidential, the information will not have been received in confidence. This interpretation accords with what I think is the legislative policy underlying s. 16(1)(b), i.e., to promote and protect the free flow of information between governments and their agencies for the purpose of discharging their duties and functions.[19]

[27] Later in that Order, the former Commissioner articulated the following factors that should be used to determine whether the information had been received in confidence pursuant to s. 16(1)(b):

> What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following factors - which are not necessarily exhaustive - will be relevant in s. 16(1)(b) cases:
>
> 1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
>
> 2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
>
> 3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)
>
> 4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)
>
> 5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?
>
> 6. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?

[19] Order No. 331-1999, 1999 CanLII 4253 (BC IPC), p. 6, followed in *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124.

7. What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?[20]

[28] I will consider these factors along with the evidence in my analysis, below.

Parties' submissions

[29] The applicant does not provide submissions on the applicability of s. 16(1)(b) to the information, as he states he "cannot be aware of the content, sensitivity nor the scope of the documents being withheld for the very reason they have been redacted."[21]

[30] The Ministry provides two affidavits in support of its submissions, one sworn by the Regional Director of the Ministry of Transportation and Infrastructure's South Coast Region,[22] and the other sworn by the Chief Administrative Officer of the TFN. Some of the evidence was properly submitted on an *in camera* basis, so I am limited in how much detail I can provide in this Order. Both affiants state that the Ministry received the Bunt Report on a confidential basis.

[31] The Regional Director deposes the following in his affidavit:

1. The expectation of confidentiality continued throughout the planning, negotiation and development processes of the development in question;

2. The Ministry was "very aware that the TFN considered the contents of the Bunt Report to be sensitive and confidential";

3. The Ministry's general practice is not to share information in TIAs or any reports provided to the Ministry through the planning and development process without the developer's consent, as information in the reports may be considered to be "especially sensitive to the third party" and release of the information could potentially harm the success of future phases;

4. The more information that the Ministry is able to obtain from an aboriginal government can be helpful to future Ministry planning (including its 10 year funding plans); and

[20] Order No. 331-1999, 1999 CanLII 4253 (BC IPC), p. 6, followed in *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124.
[21] Applicant submissions, para. 19.
[22] I note that the affiant deposes that he was involved in much of the consultation and approval process surrounding the TFN Tsawwassen Mills development as the District Manager.

5. While an aboriginal government would still be required to provide information to satisfy the TIA requirements, additional information can improve the Ministry's understanding of long-term planning in the area.[23]

[32] The Chief Administrative Officer of the TFN deposes the following in his affidavit:

1. The TFN considers the withheld information in the Bunt report to be sensitive and confidential;

2. The TFN expected that the information that was provided to the Ministry would be treated in a confidential manner throughout the planning, negotiation and development processes of the development;

3. The final report was sent to the Ministry and the cover letter did not expressly deal with the issue of confidentiality, but it was clearly understood at that time that the Ministry would treat the final version of the Bunt Report in the same confidential manner as the previous draft Bunt Report; and

4. If TFN felt that the information could not be kept confidential, it would be reluctant to provide the BC government with the same amount of information in future discussions.[24]

[33] In exhibits attached to their affidavits, both affiants provide a redacted copy of the cover letter that was sent with the earlier draft version of the Bunt Report, which states the following, "Tsawwassen First Nation very much appreciates Ministry staff reviewing the above noted draft study [the Bunt Report] on a confidential basis as previously agreed upon at your Sept. 21, 2011 meeting with [named parties, including Bunt & Associates]." The letter ends with, "[a]gain, as noted above, TFN very much appreciates the Ministry not sharing the contents of this draft study [the draft Bunt Report] beyond Ministry staff at the present time."[25]

[34] The applicant provides evidence that TFN sent both the draft and the final versions of the Bunt Report to the Corporation of Delta, and that Delta publicly issued council reports that outline or summarize statistical information from the Bunt Report.[26] The second council report specifically states that the purpose of the report was to "summarize the impacts to the regional highway system and

[23] Regional Director affidavit, paras. 30 – 32, 33 (some *in camera*), 34, 36, 37.
[24] Chief Administrative Officer affidavit, paras. 7, 8, 10 (some *in camera*), 14 (some *in camera*), 20 (some *in camera*).
[25] Regional Director affidavit, para. 29 and exhibit "D" (most *in camera*); Chief Administrative Officer affidavit, para. 6 and exhibit "A" (most *in camera*).
[26] Applicant submissions, exhibit "A", and attached Council Reports dated April 26, 2012 and October 16, 2012.

Delta roads as outlined by the latest analysis and simulation modeling undertaken for the Tsawwassen First Nation (TFN) by their traffic consultants, Bunt and Associates." The second report also includes several attachments, including maps showing future traffic volume comparisons (AM, PM and Saturday) and traffic queues. The applicant asserts that those council reports are publicly available. The Ministry did not dispute that the reports are publicly available.

Analysis and conclusion on s. 16(1)(b)

[35] As noted above, there is a relatively small amount of information being withheld from the records. It is clear from the submissions and evidence that the TFN believes that it provided the information in the Bunt Report and PowerPoint presentation to the Ministry in confidence. However, the issue is whether a belief that it was *received* in confidence is objectively warranted.[27] In other words, there must be some contextual evidence which indicates that the information was received in confidence.[28]

[36] For the reasons that follow, I find that the withheld information was not received in confidence by the Ministry.

[37] Turning to the factors set out in Order 331-1999, above, it is unlikely that a reasonable person would regard this withheld information as being confidential in nature. It is statistical data obtained from a traffic model and it appears to be information the Ministry required in order to approve the TIA. In my view, there is no persuasive evidence that any of this information is inherently sensitive or confidential.

[38] The Ministry deposes that usual practice has been to keep this type of information confidential, at least until after the development phase, whether it was received from an aboriginal government or a private developer. By this, I understand the Ministry to be asserting that it does not routinely publish or otherwise make these kinds of records publicly available in the ordinary course.

[39] However, I find that the parties did know that the majority of the information in the Bunt Report, including the statistical information, would be publicly disclosed at some point. The cover letter enclosed with the draft Bunt Report sent to the Ministry states that TFN appreciates the Ministry not sharing the contents of this draft study beyond Ministry staff "at the present time." In my view, this provides some evidence that the parties knew at least some of the Bunt Report would be shared with others in the future.

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[27] *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124, para. 67.
[28] Order 331-1999, 1999 CanLII 4253 (BC IPC), para. 37, cited with approval in *Chesal v. Attorney General of Nova Scotia* at paras. 71-72.

[40] I also find the fact that the Bunt Report was shared with Delta is persuasive evidence that the parties knew the contents of the Bunt Report would have to be shared beyond the Ministry. I have reviewed the Delta council reports and find that they reveal some of the information in dispute, so at least some of this information is already in the public domain. I am also persuaded by the fact that the Ministry disclosed the vast majority of the information, including most of the statistical information, to the applicant. There is no evidence that the TFN challenged that disclosure decision.

[41] There is no persuasive evidence that there was an implicit or explicit agreement by the Ministry to receive or keep the *final* Bunt Report confidential. This is in contrast to evidence regarding the draft Bunt Report, where there was an explicit agreement by the parties to keep the draft material confidential, at least for a certain amount of time. As well, the fact that the Ministry disclosed almost the entire Bunt Report when an access request was made strongly indicates that it had not agreed to receive and keep it confidential. I can see no significant difference between much of the statistical type of information the Ministry disclosed and that which it withheld. The Ministry does not explain why, if the Bunt Report was received in confidence, it chose to disclose most of it to the applicant.

[42] For the reasons that follow, I also find that the supply of the statistical information to the Ministry in this case was compulsory, not voluntary. Where the supply of information is compulsory, this indicates that the recipient alone is in control of any conditions for its receipt. The person supplying the information would have little to no control or ability to impose conditions on its receipt, including the condition that it be received and kept confidential by the recipient.[29]

[43] The Regional Director provided the Ministry's Planning and Designing Access to Developments Policy Manual (Manual) which it relies on when assessing traffic impacts of proposed developments.[30] According to the Manual, larger projects will require the applicant to submit a detailed report, which includes a detailed traffic analysis, including traffic count data and not only existing and opening day conditions, but also future operations for the site.[31] I have reviewed the Manual and the type of information it says must be included in the TIA is precisely the type of statistical information that is in the Bunt Report. For that reason, I find that the TFN had to provide this information to the Ministry in order to obtain TIA approval.

[44] For the above reasons, I am not persuaded that the statistical information was received in confidence. I give considerable weight to the nature of the information, as well as the fact that the TFN was required to provide statistical

[29] See Order 01-52, 2001 CanLII 21606 (BC IPC), para. 130.
[30] Regional Manager's affidavit, Exhibit "A" and website URL to obtain the full version of the Manual online: http://www.th.gov.bc.ca/permits/siteimpact/locked/PDAD_Manual_sept21.pdf.
[31] Manual, *supra*, pp. 2-4 and 4-4.

information at issue in order to obtain the necessary approval from the Ministry. I have also taken into consideration the fact that some of the statistical information at issue is publicly available in the Delta Council reports. While this is not determinative of the issue, I find that it supports the conclusion that the statistical information was not provided to the Ministry on a confidential basis. It was concurrently provided to Delta on what was presumably a non-confidential basis, considering Delta published some of the statistical data in its Council Reports.

[45] Further, I have no evidence before as to why some statistical information was disclosed to the applicant while similar types of information were withheld, and it is not evident from the records and the Ministry does not explain why this occurred. There is also no evidence of explicit statements made by the Ministry or TFN at the time that the information was received in confidence. In my view, the actions of the parties do not provide objective evidence of a reasonable expectation that the statistical information was being received in confidence.

[46] The onus is on the Ministry to prove the applicant has no right of access to the information it is refusing to disclose under s. 16(1)(b) and, in this case, I find that the Ministry has not met this burden. Therefore, I find that s. 16(1)(b) does not authorize the Ministry to refuse to disclose the statistical information. I will consider whether s. 16(1)(a) applies to this information, below.

Section 16(1)(a) – harm conduct of relations between governments

[47] Section 16(1)(a) states:

> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:…(iii) an aboriginal government; …

[48] Unlike s. 16(1)(b), s. 16(1)(a) is a harms-based provision. It is incumbent on the party seeking to withhold the information to provide evidence that supports the conclusion that disclosure could reasonably be expected to result in the alleged harm.

[49] The Supreme Court of Canada has stated the following about the standard of proof for exceptions that use the language "reasonably be expected to harm":

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which

> is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground… This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.[32]

[50] Further, there must be a "clear and direct connection" between disclosure of the particular information and the harm alleged, and the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.[33]

[51] The affidavit evidence sets out the Ministry and TFN's positions with respect to the alleged harm that will occur if the information is disclosed. Much of the TFN's affidavit evidence was properly submitted on an *in camera* basis, and I am therefore limited in how much detail I can provide in this order. However, I can say that the TFN's position is that the withheld information is sensitive and if the TFN felt that the information could not be kept confidential, it would be less likely to provide the Province with the same amount of information in future discussions, or even engage in discussion about future improvement projects.

[52] Further, the TFN is concerned that disclosure may result in the TFN and the Province having to make opposing public statements about the information and that this may have a negative impact on the relationship between the Province and the TFN.[34] I am unable to elaborate further on this, as much of the evidence relating to this is *in camera*. I will address it again in my analysis, below.

[53] For its part, the Ministry states that it was aware that the TFN considered the contents of the Bunt Report to be sensitive and confidential. If it were disclosed, the Ministry believes that the TFN "would likely be unwilling in the future to provide the same level of information in future development applications and discussions."[35]

[54] After reviewing the submissions, evidence and the records, I am not persuaded that disclosure of the information could reasonably be expected to result in the alleged harm. While I appreciate the concerns the TFN have about

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[32] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, para. 54.
[33] Order F07-15, 2007 CanLII 35476 (BC IPC), para. 17, referring to *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII), [2002] 2 S.C.R. 773; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, para. 43.
[34] Chief Administrative Officer affidavit, paras. 10 – 20 (some *in camera*).
[35] Regional Director's affidavit, para. 33 (some *in camera*).

the potential for damage to its relationship with the Province, I do not see a clear and direct connection between disclosure of the information and the injury the TFN alleges would occur. In my view, TFN's *in camera* evidence contains speculative assertions of harm and does not support a finding that harm could be reasonably expected to occur should the information be disclosed.

[55] In making this finding, I give considerable weight to the fact that the some of the statistical information is publicly available in the Delta Council reports. It is difficult to connect disclosure of the withheld information with the harm alleged when related information is already publicly available. In a similar vein, it is difficult to accept the Ministry's argument on harm when similar information has already been disclosed to the applicant. In my view, disclosure of any remaining information that has not already been publicly disclosed could not reasonably be expected to result in the harm alleged.

[56] Furthermore, I have already determined that providing the statistical information was compulsory and not voluntary. In my view, there is no objective evidence to support the finding that TFN would not provide similar information to the Ministry in the future, as it is required to do so in order to obtain Ministry project approval.

[57] I find that the harm alleged is too speculative to meet the threshold set out by the Supreme Court of Canada. For the above reasons, I find that s. 16(1)(a) does not authorize the Ministry to refuse to disclose the statistical information.

CONCLUSION

[58] For the reasons given above, under s. 58 of FIPPA, I confirm that the Ministry is not authorized to refuse to disclose the statistical information under either s. 16(1)(a) or (b) and order that the Ministry is required to give the applicant access to the withheld information by June 22, 2017 pursuant to s. 59 of FIPPA. The Ministry must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

May 10, 2017

ORIGINAL SIGNED BY

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Carol Whittome, Adjudicator

OIPC File No.: F15-64329